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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/510,937	02/22/2000	Carey V. Campbell	MP/55G	2961

7590

12/30/2002

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EXAMINER

NOLAN, SANDRA M

ART UNIT	PAPER NUMBER
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1772

16

DATE MAILED: 12/30/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application N .

09/510,937

Applicant(s)

CAMPBELL ET AL.

Examin r

Sandra M. Nolan

Art Unit

1772

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 13 December 2002.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-28 is/are pending in the application.
- 4a) Of the above claim(s) 21-28 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-20 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☒ Claim(s) 1-28 are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 22 February 2000 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.  
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some \* c) ☐ None of:  
1. ☐ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).  
\* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).  
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☒ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)                      4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)                      5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_                      6) ☐ Other: \_\_\_\_\_

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submissions filed on 13 December 2002 (Paper Nos. 14 and 15) have been entered.

### ***Transferred Application***

2. The undersigned examiner notes, for the record, that this application was transferred to Art Unit 1772 shortly after the RCE request was submitted.

### ***Claims***

3. Claims 1-28 are pending, with claims 21-28 being withdrawn as non-elected. See section 4 below.

### ***Election/Restriction***

4. Newly submitted claims 21-28 are directed to an invention that is independent or distinct from the invention originally claimed for the following reasons: they do not call for the node and fibril structure that the original claims—i.e., claims 1-9—required.

In other words, the application now contains claims to two inventions, as follows:

I. Original claims 1-9 and new claims 10-20 cover composites having node and fibril structure in which porous fluoropolymer layers have nonporous fluoropolymer layers thereon. These composites are classified in class 428, subclass 36.4.

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II. Newly added claims 21-28 cover composites of porous fluoropolymer layers with nonporous fluoropolymer layers thereon, which composites are classified in class 428, subclass 35.7.

Since applicant has received an action on the merits for the originally presented invention (invention I), this invention has been constructively elected by original presentation for prosecution on the merits. Accordingly, claims 21-28 (which read on invention II) are withdrawn from consideration as being directed to a non-elected invention. See 37 CFR 1.142(b) and MPEP § 821.03.

### ***Double Patenting***

5. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

6. Claims 1-20 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 5 of U.S. Patent No. 5,972,441 (to Campbell et al) in view of Buck et al (US 4,925,710) and applicants' admission in the specification at page 2, lines 6+.

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The '441 patent claims tubes used as balloon catheter deployment devices, which tubes comprise multiple layers of porous expanded polytetrafluoroethylene (ePTFE) and have fibrils in each layer.

The '441 patent fails to claim nodes in its layer(s) or the use of nonporous coatings on its tubes.

Buck teaches the extrusion of nonporous fluoropolymer layers over a fluoropolymer core (abstract). The outer layer may contain fluorinated ethylene/propylene (FEP) copolymers (col. 2, line 67). Buck teaches that his multilayer system is useful in catheters and other applications that call for a lubricious inner surface is needed (col. 1, lines 20-28).

In the specification, at page 2, lines 6+, applicants admit that it is conventional in the art to make tubes of porous ePTFE having a microstructure of nodes and fibrils, which tubes are used as vascular grafts.

The three citations are analogous because they all deal with medical devices made using fluoropolymers.

It would have been obvious to one having ordinary skill in the art at the time that the invention was made to employ the fibrils and nodes discussed in the passage on page 2 of the specification in the porous, fibril-containing tubes of the '441 patent and to use the outer nonporous coating of Buck to coat the porous tubes of the '441 patent in order to produce multilayer catheters having lubricious inner surfaces.

The motivation to employ the conventional nodes and fibrils of the specification in the tubes of the '441 patent is found in the specification, where applicants admit that such structures are known in tubes used as vascular grafts.

The motivation to employ the nonporous outer coating of Buck on the tubes of the '441 patent is found at col. 1, lines 20-28 of Buck, where the usefulness of articles having the Buck outer layers thereon as catheters is discussed.

It is deemed desirable to employ catheters having conventional node and fibril structures as well as lubricious inner surfaces in order to facilitate the use of the catheters in subjects by physicians and surgeons.

The use of the catheters an inelastic balloons is deemed a matter of design/engineering preference, depending upon the intended use of the catheters.

The examiner deems Buck's FEP copolymers to inherently possess the "adhesive" properties recited in applicants' claims.

The use of the device of claims 1 or 10 a portions of balloon catheters is a matter of intended use and does not serve to distinguish the claims from those suggested by the references combined above.

### ***Response to Arguments***

7. Applicant's arguments with respect to claims 1-20 have been considered but are moot in view of the new ground(s) of rejection.

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***Conclusion***

Any inquiry concerning this communication should be directed to Sandra M. Nolan, whose telephone number is 703/308-9545. The Examiner can normally be reached on Monday through Thursday, from 6:30 am to 4:00 pm, Eastern Time.

If attempts to reach the Examiner by telephone are unsuccessful, her supervisor, Harold Pyon, can be reached at 703/308-4251. The general fax number for the art unit is 703/305-5436. The fax number for after final communications is 703/872-9310. The receptionist answers 703/308-0661.

S. M. Nolan  
Primary Examiner  
Technology Center 1700

SMN/smn  
09510937(16)  
December 27, 2002